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THE REGULATORY STRUCTURE FOR BROADCASTING

REPORT OF A WORKSHOP
JANUARY 15, 16 and 17, 1986

RESEARCH GROUP FROM THE CENTRE FOR THE STUDY OF PUBLIC LAW
UNIVERSITY OF MONTREAL
AND
THE SIMON FRASER TASK FORCE RESEARCH GROUP

LIORA SALTER

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Introduction:

Some changes will be required in the legal framework and regulatory structure for broadcasting, regardless of the content of the recommendations of the Task Force on Broadcasting. This report, prepared after a three day workshop, is designed to address problems in law and regulation.

The report draws specifically on the research for the Task Force by two groups: The Centre for the Study of Public Law at the University of Montreal, which examined the current nature and status of laws and regulations in the broadcasting system, and The Simon Fraser Task Force Research Group, which examined various methods of regulation.

The Task Force on Broadcasting represents a new starting point, similar to that of 1968 before the introduction of the Broadcasting Act. Numerous inquiries on broadcasting have been conducted in recent years; the current government has demonstrated a commitment to change; and the problems in the broadcasting system are sufficiently severe now as to preclude continuing with the same system of regulation. The recommendations include, therefore, a major proposal for restructuring the regulatory system.

It is recognized, however, that regulation weaves a strong web of relationships, and that the current approach to legislation and regulation might well be difficult to disentangle. A second set of recommendations -- a fall back position, if you will -- has also been included in the end notes.

The Background to the Proposals:

Through the research, a number of conclusions were reached about the Canadian broadcasting system and its problems. They are identified here briefly, as follows:

A. General:

(1) The public broadcasting system occupies a unique position in the broadcasting system, and represents a major social value. It requires, but does not yet have a separate and special mandate.

B. The nature of the system and its regulation:

(2) Significant difficulty exists with the current practice of adding new technologies, one by one, to the broadcasting system. The same service is often provided by different technologies or companies, which are regulated differently only because of *how* or *when* they were introduced into the broadcasting system.

(3) This makes regulation generally unenforceable and apparently unfair because different regulatory obligations are imposed in each case.

(4) The distinction between "emission" and "by artificial guide" (between broadcasting and cable, for example) is one that cannot be sustained with the introduction of the more complex technologies for the diffusion of signals. It rests, in part, on the technologically questionable assertion that only the former uses the radio spectrum or can cause technical interference.

(5) Significant difficulty also exists with sustaining the conventional notion of a "single system" when some of the new services directly affecting broadcasting neither transmit nor receive signals.

(6) Indeed, questions can now be raised about many aspects of the legal status of different components of the regulation of broadcasting. It is a matter of time before some of these legal questions result in court action.

(7) Despite the introduction of many new technologies for the diffusion of services, and increased channel capacity on some of them, the radio frequency remains a scarce resource, subject to allocation in the first instance by international treaty, and it is invested with an important public interest. As enterprises, companies providing services related to broadcasting perform a critical service invested with an important national interest.

C. Regulatory issues:

(8) Regulation is traditionally conceived as involving a regulatory agency. As such, it is open to criticism (the deregulation debate) and always involves negotiation and compromise. For these reasons, regulatory agencies are not necessarily the best or most adequate means of dealing with broadcasting.

(9) In fact, in no other economic sector, does a single regulatory agency attempt to secure control over all aspects of sectoral development and activity; the task undertaken as a result of the current Broadcasting Act by the licensing authority is wider in scope and powers than is reasonable.

(10) As well, regulation is a "governing instrument" designed for and suitable only in relation to the private sector, but it is being used today also to deal with public broadcasting.

(11) Indeed, a choice must be made with respect to the various objectives for the broadcasting system to determine when regulation (by an agency) is suitable. The choice is whether each objective constitutes a value (more suitably achieved through legislation), a matter of rights and obligations (best effected through conventional regulation), a technical assessment (normally a departmental responsibility) or a benefit (best achieved by non-regulatory, subsidy or quasi-regulatory programs designed to provide support for particular groups)

(12) There is a now a capacity for constructive negotiation with respect to federal-provincial roles in communication, based on each level of government being responsible for a different aspect of the system and co-operative regulation of some aspects of the system (as is possible under some sections of the Railway Act, for example).

D. Issues related to the nature of the system:

(13) Although many services can be classified as both "carrier" (1) and "distributor" (*distributor: involved with the intervention in and control over the information content of programming for the purposes of its public dissemination*), a strong case can be made for "content/carrier" separation in communications and for treating all carriers in a similar manner (and all distributors as well). The requirements for the regulation of content and of carriage differ significantly.

(14) In the regulation of content, the encouragement of a "high standard" of programming and diversity (etc) of program content is a fundamental objective for regulation, but must be conducted without censorship, or direct governmental involvement (real or perceived) and in a manner capable of enforcement.

(15) With respect to the regulation of carriers, major issues arise with respect to the management of the spectrum as a natural resource. For example, the natural monopoly status of some of the carriers is now in question and a technical determination needs to be made now (and at regular intervals in the future) if

regulation is to be based on the natural monopoly status of any particular service.

(16) While issues of concentration of ownership in communications are of serious concern for both carriers and distributors, these issues are difficult to address in a single economic sector. The experience of using regulation to deal with issues of concentration in broadcasting has not been encouraging. An alternative approach is to deal directly with the problems that concentration of ownership produces -- to design regulation to facilitate accountability, maximum possible diversity of access and priority carriage of particular services.

E. Restructuring regulation:

(17) Regulation can take many forms, only some of which involve an independent tribunal. There is a place in a proper regulatory system for Departmental involvement (regulation by permit) to deal with issues of spectrum management, and for federal-provincially appointed hearing panels to deal with issues related to carriage.

(18) Significant confusion now exists in the legal categories used for licensing (for example the definition of a network) and in the formal discussion of issues in broadcasting. (the difference between distribution,carriage and and exhibition). These problems are not just terminological, but also cause serious regulatory problems since they add levels of regulatory complexity (that preclude public access to decision-making) and permit contradictory approaches to the regulation of similar services.

(19) Important distinctions exist between the decisional activities of any regulator (which are discretionary) and their regulations (which apply to all). In recent years, the regulator has used its discretionary powers (conditions on licence) to deal with matters of general concern, in effect creating "regulation" without specific regulations. The problems created by the confusion of powers and approaches to decision making arises from the Broadcasting Act, which fails to specify adequately the scope and responsibilities attached to the powers of the regulator.

(20) The licensing procedure must become more streamlined, not more complicated as a result of any restructuring.

(21) The most critical problem in relation to law and regulation of broadcasting is in its enforcement. The CRTC, for example, now has a choice between "a pin and a tank" with respect to licensees failing to meet their commitments. Significant changes in approach are necessary if regulation is to have credibility.

(22) The procedural informality that served the CRTC well in its initial period of operation now causes procedural unfairness, lack of scrutiny of issues and public inaccessibility.

Restructuring Regulation

The reorganization of the legal and regulatory framework for broadcasting (in light of the problems identified above) requires a number of separate measures. They are, as follows:

(1) a separate system of control and decision making for public and private broadcasting.

(2) a separation of the regulation of content and carriage.

(3) the regulation of all similar (potentially competitive) services under the same regulatory framework and by the same regulatory body.

(4) an increased role for federal and provincial governments in questions related to issues of carriage.

(5) increased independence and public accountability of the tribunal responsible for regulation of program content.

(6) better delineation and limitation of the scope and powers of the regulatory authorities.

(7) a streamlining of the regulatory process.

Three separate legislative Acts are required by these measures, each Act incorporating portions of existing legislation(2). They are, as follows:

Carrier Act

This Act would supercede and incorporate relevant sections of the Radio Act, the Broadcasting Act, The National Transportation Act and the Railway Act.

All enterprises performing the function of carriage of electromagnetic signals whether by emission or by artificial guide would fall under its jurisdiction.. Classification of carriers would be by type of service (3).

The Act would delineate responsibilities of the Department of Communications and of a federal-provincially appointed hearing panel which would function as **a national communications utilities commission**.

The **Department of Communications** would have responsibility for spectrum management, the technical quality of signals and signal standards, the allocation of available frequencies and the assignment priority of carriage for different signals The discretionary powers of the Department of Communications would be limited by specific provisions in the Carrier Act governing priority of signal carriage (4) and Canadian ownership.

The **National Communications Utility Commission** would hold hearings to consider questions pertaining to rates, rate rebalancing and competition and ownership (other than the question of Canadian ownership), and would issue licences to all carriers. (5) In the case of carriers also having responsibility for content (satellite carriers like Cancom, conventional broadcasters and possibly cablecasters (6), for example), consideration by the NCUC would follow upon and be contingent upon a positive decision by the body responsible for regulating program content (see below).

Revised Broadcasting Act

The new Broadcasting Act would incorporate some segments -- dealing with issues of program content -- from the current Broadcasting Act and supercede it.

The Act would establish a new broadcasting agency with a mandate limited to issues related to the **quality, type and quantity of program content (7, see also note 3)**. To maintain its independence from government control, its members would be appointed

The new agency would have powers to make decisions only with respect to the distribution of programming by a licensed carrier. Distribution is defined as intervention in, responsibility for and control over the information content of programming.

Opportunity for competition between potential distributors would be provided through a hearing process, once the provision for carriage had been established. The decisions of the agency would deal with the conditions of agreement between the agency, the distributor and the carrier with respect to a promise of performance regarding program content.

Procedures to be used in reaching decisions would be specified in the legislation and would include provision for disclosure, cross-examination and other measures **designed to foster natural justice (8)**. Decisions by the new agency would be incorporated into the licences held by carriers.

The decisions issued by the agency would make explicit the conditions under which approval was granted for any distribution-carriage service. **The new agency would have its own powers of enforcement**, related to contract-based promises of performance between the agency, distributors and carriers. Such powers of enforcement would include the power to order the rectification of any breach of performance, to levy fines and issue injunctions and the power to rescind approval of a promise of performance.

Canadian Broadcasting Corporation Act

This Act would incorporate sections of the current Broadcasting Act related to the CBC and provide a special mandate and system of accountability for the Canadian Broadcasting Corporation.

The mandate for the CBC would include provisions now in the Broadcasting Act and, in addition, several new priorities. They are, as follows:

(1) The CBC should be considered as a national resource for all Canadians.

(2) The CBC should have a special role with respect to production and distribution of programs by and for Canadians and a special mandate with respect to Canadian cultural production.

(3) The establishment and diffusion of the regional and national CBC services should constitute a first (but not exclusive) priority for the CBC.

(4) The focus of effort of the CBC should be on the provision of a broadcasting, not narrowcasting service. If narrowcasting services are offered by the CBC, they should be part of an integrated broadcasting service.

The Board of Governors of the CBC should be restructured to create greater accountability (9) and should be given a broader mandate with respect to the governance of the CBC. The Board should report to an all-party committee of Parliament at regular intervals.

The Regulatory Process

Restructuring the broadcasting system will require a reorganization of the regulatory process(10). A number of principles (some of which have been identified already) govern the licensing process. They are, as follows:

(1) There should be a clear separation of content and carriage.

(2) With this separation, however, there should be a single licence.

(3) Thus licences should be granted to carriers only. All carriers would be licensed in terms of the type of service they provide.

(4) As a consequence, distributors would not be required to seek regulatory approval until arrangements were sought for carriage of their signal.

This measure would have the effect of releasing pay and specialty operators from the requirement for licensing until they (or other possible distributors) sought to enter a specific arrangement for carriage of their signal.

(5) Distributors would seek approval of arrangements for their carriage through a competitive hearing process designed to deal with issues of program content.

(7) The separation of content and carriage would permit greater involvement of both levels of government and departmental officials on issues related to carriage.

(8) At the same time, issues of content would not be determined by a governmental body.

The licensing process can be represented as a series of steps to be taken, as follows:

The Licencing Process

step one

carrier seeks assignment of technical resources (including spectrum allocation, if required) from the Department of Communications (as occurs now)

step two

if carrier provides carriage of signals exclusively, then carrier applies for a licence from National Communication Utilities Commission, which considers the effect of new service on competition, and also rates and tariffs, questions relating to interconnection of services, access to service etc.

In the case of most carriers (not, for example, TVRO's) a hearing would be held before a decision is rendered.

step two

if carrier is also a distributor or if affilliation with a distributor is sought,an application is made under the new Broadcasting Act.

A competition is then held for the right to provide distribution.

This is identical with the current licensing process inasmuch as a call for applications is released and a hearing is held pursuant to that call.

A decision is made under the provisions of the Broadcasting Act with respect to the distributor(s), specifying their promise of performance in an agreement between the agency, the carrier and the distributor(s).

This agreement is included in the license obtained from the National Communications Utility Commission.

step three

application is made and a hearing is held in relation to the granting of a licence by the National Communications Utility Commission.

End Notes:

1.Carriage/Diffusion:

In the research on the **Status of Broadcasting Undertakings**, the function of "diffusion" is identified and distinguished from the production and distribution functions. These distinctions are comparable to the distinctions made in film policy and clarify the various roles played by some, but not all licensees. In this report, the function of diffusion is discussed using the term "carriage", because the debate about a separation of content and carriage is well-established and familiar to the reader and because a "Carrier Act" is proposed. The term diffusion refers, then, to the function, and the term "carrier" to the licensee who carries out this function.

Although the approach and specific recommendations are different from that taken in Peter J. Lown's paper for the Task Force (**A Definition of Roles and Responsibilities of the Major Actors in the Broadcasting System**), the recommendations of the two papers are, by and large, directed at the same problems and many overlap.

2. Copyright:

Changes proposed for the Copyright Act parallel and are compatible with those envisioned for broadcasting in this report.

3. "Programming vs non-programming" services:

Two distinctions are necessary to support a content/carrier separation in regulation:

(a) a distinction between "addressable and non-addressable" services:

> **- addressable services are those providing different information content to individual members of their audience (formerly "point to point communication")**
>
> **- non-addressable services are those providing the same information content to all members of its audience (formerly called "point to mass" communication.)**

There are several reasons for the shift in terminology from "point to point/mass" to "addressable/non-addressable". First, the new terms eliminate the necessity of distinguishing between programming and non-programming services (between news presented visually and in digital format, for example) on the basis of their format of presentation. Second, they identify those services which are truly discretionary, in the sense that the *content* of

information is available only at the discretion of individual members of the audience. Third, they permit the inclusion in the consideration of program content of "broadcast-like" services which are offered on the carriers that have traditionally not been considered as broadcasting, if their information content is available without discrimination to an audience of their subscribers. Fourth and finally, they permit easy content/carrier separation and the regulation of all carriers under the same regulatory framework, since addressable services can be dealt with in terms of carriage only, whether or not issues of content arise.

(b) a distinction is also necessary between types of service. The proposed categories are: "broadcasting, narrowcasting, and single purpose"

- **broadcasting is service which is varied and comprehensive in terms of its programming content and possible audience.**

- **narrowcasting is service which is designed to appeal to a specific interest or segment of the population.**

- **a single purpose service is one which provides a single type of information content only (for example, a classified advertising or shopping service)**

The purposes of these distinctions are to facilitate decisions on priority of carriage and to eliminate the questionable distinction between "programming and non-programming" services.

4. Priority of carriage:

It is proposed that priority of carriage be included as a legislated provision in the Carrier Act and that it be administered under the jurisdiction of the Department of Communications. Value decisions are required about the order of priorities for carriage of signals before such legislation is enacted. Several changes in the categories of programming are necessary, however, if decisions on priority of carriage are to be meaningful. They are, as follows:

categories of service:

(1) type of service: "broadcasting, narrowcasting and single purpose"

(2) local content: designated by percentage of local content in the program schedule in the promise of performance.

(3) Canadian content: designated by percentage of Canadian

content in the program schedule in the promise of performance after a minimum standard has been achieved.

In addition, a decision will have to be made about the priority given to CBC carriage in relation to first local or other local services.

5. Licensing and regulatory delays:

While the proposed regulatory process is streamlined and prevents confusion of issues, consideration of major applications by the National Communications Utility Commission could conceivably require more extensive scrutiny of rate and competition-related issues and thus introduce some delay in licensing. This possible delay in licensing should be offset by a signficantly longer licensing period.

6. The Regulation of Cable:

The proposed restructuring of regulation would alter the position of cable. Cablecasters would function as carriers, unless they also performed a distribution function.

As carriers, decisions on issues such as rates, interconnection and competition would be made by the National Communications Utilities Commission. Cable would be regarded as one type of service.

When cablecasters also function as distributors, they should fall under the revised Broadcasting Act in the same manner as any other enterprise with a dual distribution/carrier role (such as conventional broadcasters). Cablecasters would then be subject to obligations appropriate to whatever type of distribution service they provide (see note 3 on types of service)

The community channel should be licensed separately and funded along with cultural production through a mechanism of a special tax, which can be imposed on more than the cable industry.

7. Canadian Content (see also note 3):

It has been proposed in one of the research reports that the approach to Canadian content regulation be altered, as follows:

(1) The creation of minimum standards relating to types of programming and service (rather than proportion of airtime)

(2) The use of a priority system with respect to carriage of signals which takes the proportion of Canadian content (above the minimum standard) into account when allocating priority

access to carriage and other benefits of regulation.

The restructuring of the regulatory framework proposed here is compatible with such an approach to Canadian content.

8. Administrative burden:

The administrative burden under the new Broadcasting Act proposed here is reduced by a number of factors. They are, as follows:

(1) Elimination of the need to licence enterprises until contracts are envisioned between specific distributors and carriers. This means, for example, elimination of the general licensing of pay and specialty television enterprises. (the problematic definition of pay television as a "network service" is also eliminated)

(2) Reduction of the scope and jurisdiction of the broadcasting agency to deal only with questions of program content and delineation of its powers to decide and make regulations.

(3) Consideration of all carriers under the same legislation so that rationalization of carriage and spectrum management can occur. Reduction of the regulatory complexity introduced when different regulatory frameworks apply to similar services.

(4) Legislative provision for priority of coverage, to eliminate regulatory decision making with respect to channel allocation.

(5) Elimination of public broadcasting from the regulatory mandate.

(6) Reregulation of many of the functions of cable under the new Carriers Act and rationalization of the obligations of cablecasters in terms of the type of service they provide.

9. The public broadcasting system:

Accountability of the CBC can best be achieved by a restructuring of the CBC Board of Governors and by legislative provisions that would make the Board responsible for the management of the Corporation more fully. Appointments to the Board of Governors might be on a consensus basis (involving representatives from consumer (perhaps including proivincial representatives) and producer groups and from the government which provides financing. Such a consensus-based Board might reasonably report to an all-party committee of the legislature without jeopardizing the independence of public broadcasting.

10. Procedures:

The need for more formal procedures designed to foster fairness, access to information and natural justice is widely recognized. Unless included in the specific provisions of the legislation, it is impossible to guarantee the introduction of these reforms.

11. Some measures for reform:

If a restructuring of regulation is not proposed by the Task Force on Broadcasting, some regulatory reforms are still necessary. These have already been proposed in the two background research reports, **The Status of Broadcasting Undertakings** and **Methods of Regulation**. Some of these measures are, as follows:

(1) Clarification of the terminology used for the classification of types of service both in law and in the regulatory framework used by the CRTC, drawing upon the distinctions between the production, distribution and diffusion functions.

(2) Delimitation of the scope of responsibilities of the CRTC with respect to decisions and issuing regulations.

(3) Re-evaluation of the mechanism of using conditions on licence as a means of establishing "general regulations".

(4) Separation of the public broadcasting system from the current regulatory framework and enactment of specific legislation dealing with the CBC.

(5) Revisions of the Broadcasting Act to provide the agency with responsive mechanisms of enforcement of their decisions.

(6) Deregulation of measures intended to enact values (use of legislative provisions to ensure compliance, in the manner used to achieve Canadian ownership) and to provide benefits (use of codes, subsidies and special taxation programs instead of regulation)

(7) Re-evaluation of the methods of developing and implementing codes, if the agency is to place reliance upon codes as a means of ensuring high quality programming.